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JAN 4 12 05 PM '95
FEDERAL ELECTION COMMISSION
OFFICE OF THE GENERAL COUNSEL

**Subject: New York Mercantile Exchange
Our File No. 62751-01**

Dear General Counsel:

ADR 1995-02

On behalf of the New York Mercantile Exchange ("NYMEX") and NYMEX Political Action Committee, Inc. ("NYMEX PAC"), we seek confirmation, by advisory opinion of the Federal Election Commission ("FEC" or the "Commission") pursuant to 11 C.F.R. Section 112.1, that NYMEX PAC lawfully may solicit members of the COMEX Division of NYMEX who hold COMEX Division seats which are beneficially owned by member firms.^{1/}

1. Background

NYMEX is the nation's third largest futures exchange, the world's largest energy commodities market, and the world's most active precious metals market. NYMEX operates through two trading divisions: the NYMEX Division and the COMEX Division.

The COMEX Division, which trades primarily precious metals contracts, was created on August 3, 1994 when the formerly independent Commodity Exchange Inc. became a subsidiary of NYMEX. The COMEX Division continues to be the dominant exchange for gold, silver and copper futures and futures options trading and is a designated contract market for additional contracts, including aluminum and Eurotop 100 futures. COMEX Division Regular Members trade all of these contracts and are authorized additionally to trade certain new contracts of both divisions. COMEX

^{1/} On October 6, 1984, NYMEX filed an advisory opinion request (No. 94-34) seeking confirmation from the Commission that NYMEX PAC generally may solicit members of the COMEX Division ("COMEX Division Regular Members").

Division Regular Members also have an economic stake in NYMEX generally based upon the future economic success of both NYMEX trading divisions.

Of the 772 COMEX Division Regular Memberships, 265 are held by individuals on behalf of member firms. This request for guidance concerns whether such natural persons, who are not beneficial owners of their seats, may be solicited freely in the manner of the remaining COMEX Divisions Regular Members who own their seats individually.

2. Analysis

2.1 Definition of "Member"

NYMEX PAC may solicit at will persons considered by the Commission to be solicitable members of the exchange. The issue of who is to be considered a solicitable members at first was addressed by the Commission on a case-by-case basis. In Advisory Opinion 1988-38^{2/}, a ruling relating to the Chicago Board of Trade, the Commission held that only one solicitable membership exists with respect to each seat on a stock or commodities exchange.^{3/} Thus, in cases where an individual held a seat beneficially on behalf of a member firm, either the individual or the firm could be solicited, but not both. Which party was solicitable was to be determined based upon the facts and circumstances of each case, with particular focus upon the voting rights and other economic interests of the respective parties.^{4/} The Commission applied similar

^{2/} FEC Financing Guide ¶ 5940 (CCH) (October 11, 1988).

^{3/} *Id.* at 11,502.

^{4/} The Commission concludes that . . . where the individual's membership is registered for the benefit of the firm, the individual, and not the firm, is a member. In such a situation, the firm's name may be used for doing business, but the individual retains all rights and obligations of membership. The Commission concludes that . . . where the title and value are owned by the firm, the firm, and not the individual, is the member. Although . . . the individual retains the rights and responsibilities of membership, he or she does so at the sufferance of the firm (once ownership of the title and value is vested in the firm). In addition, the firm, not the individual, may transfer the membership and thus appears to have the proprietary interest in the membership.

Id. at 11,503.

logic in later cases. *See e.g.* Advisory Opinion 1987-31 (a 1989 decision modifying an advisory opinion to Chicago Board Options Exchange, Inc.).^{5/}

In August 1993, the Commission modified its regulations to expressly define certain categories of solicitable members, while retaining the discretion to consider other factors on a case-by-case basis as follows:

(B) For purposes of paragraph (b)(4)(iv) of this section, *members* means all persons who are currently satisfying the requirements for membership in a membership association, affirmatively accept the membership association's invitation to become a member, *and either*:

(1) Have some significant financial attachment to the membership organization, such as a significant investment or ownership stake (but *not* merely the payment of dues);

(2) Are required to pay on a regular basis a specific amount of dues that is predetermined by the association and are entitled to vote directly either for at least one member who has full participatory and voting rights on the highest governing body of the membership association, or for those who select at least one member of those on the highest governing body of the membership association; or

(3) Are entitled to vote directly for all of those on the highest governing body of the membership association.

(C) Notwithstanding the requirements of paragraph (b)(4)(iv)(B)(2) of this section, the Commission may determine, on a case by case basis, that persons seeking to be considered members of a membership association for purposes of this section have a significant organizational and financial attachment to the association under circumstances that do not precisely meet the requirements of the general rule.

11 C.F.R. § 100.8(b)(4)(iv)(B) and (C) (1994). *See also* 11 C.F.R. §114.1(e)(2) and (3) (1994).

^{5/} FEC Financing Guide ¶ 5909 (CCH) (as vacated and modified February 9, 1989).

Thus, in order for NYMEX to solicit a member, such a person need meet *one* of four criteria: (1) the member must have a significant financial stake, (2) the member must pay regular dues and have certain limited voting rights, (3) the member must be entitled to vote for all members of the highest governing board, or (4) based upon a Commission finding, the member's organizational and financial attachment must be significant enough to merit "member" status.

2.2 Rights and Obligations of Members When Seats Are Beneficially Owned by Member Firms

NYMEX believes that COMEX Division Regular Members whose seats are owned beneficially by member firms are solicitable as members because they have the significant financial attachment to the exchange required by Section 100.8(b)(4)(iv)(B)(1). Even assuming *arguendo* that they do not have such an attachment, they should be deemed to qualify as members in accordance with the provisions of Section 100.8(b)(4)(iv)(C) as they plainly have a sufficient combination of organizational and economic interests (including important voting rights) to warrant their being deemed solicitable members.

2.2.1 Each COMEX Division Regular Member who holds a seat on behalf of a member firm has a significant economic and financial stake in the NYMEX enterprise. In some cases, such individuals are principals or partners in or shareholders of the firms which own their seats; thus they benefit economically from their firms' exchange activities as equity participants in such firms. In other cases, they are the officers of such firms or senior managers or are directly responsible for trading (for their employer or its customers) on one or both divisions of the exchange and their careers are directly tied to events on the NYMEX. They all are individuals with essential links to the exchange. Stated in another way, as a general matter, they hold their seats not merely as nominees, but as the persons in their respective firms who have the most to gain or to lose in the success or failure of the exchange. In this sense they largely are indistinguishable from all other COMEX Division Regular Members (*i.e.* those who own their seats individually).

COMEX Regular Division Members who hold their seats on behalf of firms also may have personal trading privileges in the COMEX Division and with respect to certain contracts traded on the NYMEX Division. Thus, aside from their important status as firm representatives, they have a personal economic stake in both the COMEX Division and the exchange as a whole through their ability to trade for profit. These members also enjoy lower fees on their personal trades as a result of the performance of the Exchange and participate in programs which provide personal life insurance, disability insurance and retirement benefits.

2.2.2 These factors, singly and together, constitute the "financial attachment" to which the definition of "solicitable persons" in Section 100.8(b)(4)(iv)(B) refers. When added to the organizational ties described immediately below, they also provide a basis for the Commission to find that such individuals are members within the scope of Section 100.8(b)(4)(iv)(C).

Although COMEX Division Regular Members whose seats are beneficially owned by member firms currently do not pay dues (although they could be required to do so), they have the same significant rights and privileges of COMEX Division Regular Members who own their seats individually. For example, they vote for the COMEX Governors Committee. These members and the COMEX Governors Committee also exercise important rights, including voting rights relating to special safeguards concerning the COMEX Division. As indicated in NYMEX October 6, 1994 Advisory Opinion Request, the trading privileges and seat value underlying a COMEX Division Regular Member's economic stake are protected by special provisions in the merger agreement between NYMEX and the formerly independent COMEX. For example, NYMEX is not allowed to increase the number of COMEX Division memberships (and thus dilute the trading privilege value) without the concurrence of a majority vote of the COMEX Division Regular Members (including individuals holding seats beneficially owned by firms). Further, pre-merger COMEX trading privileges for COMEX Division Regular Members also are protected by the requirement that a majority vote (two-thirds for allowance of certain competing contracts) of COMEX Division Regular Members would be required to concur in any termination or significant reduction of those trading privileges.^{6/} Finally, a two-thirds majority of the COMEX Division Regular Members must concur in any decision to allow new persons to trade contracts historically traded on COMEX. As to each of these important issues, individuals holding seats on behalf of member firms have all the voting rights of individual members.

In sum, COMEX Division Regular Members whose seats are beneficially owned by member firms have fundamental economic and organizational ties to Exchange -- not unlike their counterparts who own seats. They have the same political interests with respect to the federal issues that affect the Exchange as an institution and are precisely the types of members that should be allowed to join together with other seat holders in making contributions to candidates who they believe will best represent the views of the Exchange's constituency.

^{6/} See, e.g., Commodity Exchange, Inc. By-Laws § 205(D).

3. Conclusion

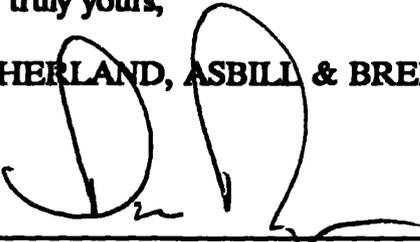
Given these factors, COMEX Division members who hold their seats beneficially on behalf of member firms plainly have significant financial and organizational stake in the NYMEX organization as a whole. They fall within the category of persons defined as "solicitable persons" within membership organizations and should be solicitable directly by NYMEX PAC.

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Your earliest attention to this submission will be appreciated. Please call upon the undersigned if you have any questions or wish additional information.

Very truly yours,

SUTHERLAND, ASBILL & BRENNAN

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